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Supreme Court, U.S.
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No. 00-616

IN THE

Supreme Court of the United States

ART MANNING,

Petitioner,

v.

McGRAW-HILL, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

KAREN E. FORD
Counsel of Record
FRANKLIN A. NACHMAN
LITTLER MENDELSON
A PROFESSIONAL CORPORATION
Attorneys for Respondent
1200 17th Street, Suite 2850
Denver, CO 80202-5835
(303) 629-6200

164391

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

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OPPOSITION TO QUESTION PRESENTED

Petitioner's statement erroneously — and misleadingly — suggests that the Court of Appeals did not consider this Court's recent decision in *Reeves v. Sanderson Plumbing Products, Inc.* Petitioner conveniently omits the critical fact that his Petition for Rehearing *En Banc* before the Tenth Circuit *specifically* raised the issue of the existence and effect of the *Reeves* decision, and that the *entire* Panel of the Tenth Circuit unanimously denied the Petition. *Reeves* did not change the law in the Tenth Circuit, and the Court of Appeals correctly applied the law in this case. Petitioner does not cite any conflicts with other decisions, or any other reasons why this Court should revisit this issue so soon after the *Reeves* decision.

Accordingly, Petitioner has not presented a question to this Court for review.

STATEMENT PURSUANT TO RULE 29.6

Respondent, McGraw-Hill, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioner's Statement contains numerous significant misstatements of fact, as well as material omissions of both the facts of the case and its procedural history. Respondent will address those misstatements and omissions.

A. Procedural History

The Petition correctly states that a three-judge panel of the United States Court of Appeals for the Tenth Circuit unanimously found that Respondent was entitled to judgment as a matter of law on Petitioner's ADEA claims. The Petition neglects to mention, however, that the Petitioner filed a Petition for Rehearing and Petition for Rehearing *En Banc* before the entire Tenth Circuit. Petitioner fails to cite this critical fact, although he included the Petition for Rehearing and for Rehearing *En Banc* in the Appendix to the Petition before this Court. In the Petition for Rehearing and for Rehearing *En Banc*, Petitioner made precisely the same arguments that he is making before this Court namely, that *Reeves* somehow may have changed the law in the Tenth Circuit, and the Court of Appeals should purportedly reconsider its decision in light of *Reeves*. The Court of Appeals unanimously denied Petitioner's Petition, and *no* member of the Court voted to rehear the case *en banc*. The Tenth Circuit's Order of July 19, 2000, is Appendix E to the Petition.

B. Statement Of Facts

The Petition selectively sets forth as facts evidence considered plainly insufficient by the Tenth Circuit, and argument represented as "facts." The essential facts are stated

in the Tenth Circuit's Opinion. For example, Petitioner incorrectly states that his performance was superior for all but the last year of his employment. In fact, the evidence conclusively showed that his performance was "below expectations" in 1990, even before Chris Westerkamp became his supervisor. Indeed, the evidence also clearly showed that Petitioner was the *worst* performing member in the sales department for all four quarters of 1992 and the first quarter of 1993, after which Respondent terminated his employment. There is no dispute Petitioner failed to meet sales-related goals he himself set, and he did not object to his performance ratings until shortly before his termination. McGraw-Hill continuously counseled him on his performance, provided him with assistance to help achieve his goals, and even reduced some of his rudimentary sales goals during the final quarter of his employment at Petitioner's request.

Petitioner concedes the station's sales department was last in its market, but incorrectly argues management embarked on a youth movement, and that there were wide-scale terminations of older employees. Petitioner's evidence consists of testimony of two employees, one of whose position was eliminated. Respondent presented testimony of two employees, one older than Petitioner and the other nearly the same age, about the improvements in the department and that they did not observe any age discrimination. Of the decisionmakers, Mr. Profitt, the Station Manager, was older than Petitioner, and Mr. Westerkamp was close in age to the Petitioner.

Petitioner cites the reassignment of his accounts, but again neglects to state that these reassignments (which resulted in demonstrably better sales performance by other

representatives) clearly were not the reasons for terminating his employment. Rather, as the Tenth Circuit found, Respondent terminated Petitioner's' employment because he continually failed to meet objective and elementary sales goals, such as calling on customers and generating new business, and not because of his total volume of sales. It specifically found, "McGraw-Hill stated reasons for terminating Manning's employment were poor performance and failure to meet his quarterly goals for over a year." There was simply *no* evidence of pretext.

SUMMARY OF ARGUMENT

It is not necessary for this Court to vacate the judgment and remand it for reconsideration in light of the *Reeves* decision. Significantly, Petitioner fails to advise this Court that the entire Tenth Circuit has already considered precisely the same issues raised in this Petition, and has unanimously rejected Petitioner's argument. The Court of Appeals has therefore already considered *Reeves* as authority and has decided not to modify its original decision.

Furthermore, *Reeves* did not change the law on judgments as a matter of law in the Tenth Circuit. The Court of Appeals followed the applicable law in reaching its decision, and its decision was correct. This Court's decision in *Reeves* will not cast any doubt on the judgment entered by the Tenth Circuit. Because this case failed to meet two important pre-conditions for vacating the judgment and remanding it in light of intervening law — namely that the lower court was unaware of the new precedent *and* the new precedent may have changed the result of the lower court's judgment, Petitioner's request for a summary vacation of the Tenth Circuit's Order, must be denied.

If the Court denies Petitioner's request for a summary reversal, then this case does not present any important and new constitutional issues requiring this Court to revisit the identical issues it considered during the last term in *Reeves*. Petitioner does not cite any important or new constitutional issues for the Court to consider, or any conflicts with decisions in other Circuits. It is clear Petitioner is asking this Court to accept this case simply because he disagrees with the Tenth Circuit's decision. That is clearly not a reason to justify this Court's extraordinary review of this case.

REASONS FOR DENYING THE WRIT

I. THERE IS NO BASIS TO GRANT CERTIORARI, VACATE THE JUDGMENT AND REMAND THE CASE TO THE TENTH CIRCUIT

A. The Tenth Circuit has Already Considered *Reeves* in Reaching Its Decision.

Petitioner has asked the Court to grant certiorari, vacate the judgment below, and remand the case to the Tenth Circuit for reconsideration in light of *Reeves v. Sanderson Plumbing Products, Inc.*, __ U.S. __, 120 S. Ct. 2097 (2000). A summary reconsideration of this Order is inappropriate because, as Petitioner inexplicably fails to advise this Court, the entire Court of Appeals has already expressly considered *Reeves*. Moreover, *Reeves* is not an intervening event for purposes of this analysis.

Contrary to misleading representations in the Petition, the entire Court of Appeals for the Tenth Circuit specifically considered this case in light of the *Reeves* decision, and *unanimously* denied Petitioner's Petition for Rehearing and

for Petition Rehearing *En Banc*. This reason alone is sufficient to deny the extraordinary relief Petitioner seeks. A summary order vacating the judgment and remanding the case for reconsideration in light of intervening authority presumes that the Circuit Court was unaware of and failed to consider the authority. *See Stutson v. United States*, 516 U.S. 163, 116 S. Ct. 611, 613 (1996), Scalia, J., dissenting (citing authority for summary reconsideration order where "an intervening event (ordinarily a post-judgment decision of this Court) has cast doubt on the judgment rendered by the lower federal court . . ."). For example, it might be inferred that a lower court was unaware of new Supreme Court precedent that precedes the judgment in question by a brief period of time. *Id.*, 516 U.S. 163, 116 S. Ct. at 613 (citing *Grier v. United States*, 491 U.S. 989, 95 S. Ct. 298 (1974)). However, absent exceptional circumstances found only in criminal cases, there is no basis for a summary reconsideration order where it is clear that Circuit Court is fully aware of the recent Supreme Court authority. *See Stutson*, *supra*, 516 U.S. 193, 195-196, 116 S. Ct. 600, 602-603 (1996).

Petitioner misleadingly suggests the Tenth Circuit might not have considered *Reeves* in reaching its original decision. In fact, the Tenth Circuit knew about *Reeves* before it rendered its initial decision. Respondent cited the pendency of the case before this Court when it filed its Citation of Additional Authority in the Tenth Circuit on March 27, 2000. (Respondent Appendix. A) Indeed, the timing of the Panel's decision makes it reasonable to conclude that it waited to issue its Order until after *Reeves* to ensure that *Reeves* did not change its analysis. In any event, Reeves did not and would not have changed the Court's analysis, as it did not change the law in the Tenth Circuit. Furthermore, there is

no dispute Petitioner made the Tenth Circuit fully aware of *Reeves* in his Petition for Rehearing and for Rehearing *En Banc*, in which his argument focused nearly exclusively on *Reeves*. (Petition Appendix F at 37a-52a). Petitioner's Brief in that Petition expressly stated in part: "The United States Supreme Court decided *Reeves* only one day prior to the Panel's decision; thus, this is the first opportunity to explain to the Court why *Reeves* mandates affirmance of the verdict." (Petition Appendix F at 41a). The entire Tenth Circuit rejected Petitioner's argument, which is precisely the same argument Petitioner is presenting to this Court. Because the entire Court of Appeals has already fully considered *Reeves* in unanimously rejecting Petitioner's rehearing and *en banc* arguments, further review by this Court or the Tenth Circuit is clearly unnecessary and unwarranted.

B. Reeves Is Not an Intervening Authority, and Did Not Change the Law of the Tenth Circuit

Reeves cannot be considered intervening authority because it did not change or alter Tenth Circuit law in any way concerning the evidence needed to support a jury finding of age discrimination. Petitioner concedes in his filing with this Court that *Reeves* "is not an intervening precedent" (Pet. at 5) and he presents no argument that it could have changed the decision in this case. Nearly five years before the *Reeves* decision, the Court for the Tenth Circuit clarified the Petitioner's burden of proof for surviving judgment as a matter of law in discrimination suits. It stated in *Randle v. City of Aurora*:

> If the plaintiff succeeds in showing a *prima facie* case and presents evidence that the defendants proffered reasons for the employment decision

> was pretextual — *i.e.*, unworthy of belief, the plaintiff can withstand summary judgment and is entitled to go to trial.

69 F.3d 441, 451 (10th Cir. 1995).

The Tenth Circuit explicitly rejected imposing an additional burden on a plaintiff to produce direct evidence of discriminatory animus. *Id.* at 451. The Tenth Circuit's rejection of a "pretext plus" standard is entirely consistent with this Court's decision in *Reeves*. For this reason, *Reeves* cannot be seen as shedding any new light on the law in the Tenth Circuit such that its reconsideration might lead to a different outcome. *See Board of Trustees v. Sweeny*, 429 U.S. 24, 25-26, 99 S. Ct. 295, 296 (1978) (Stevens, J., *dissenting*) (arguing that an order for reconsideration in light of intervening authority "should not be taken unless the intervening decision sheds new light on the law which, if it had been available at the time of the Court of Appeals' decision, might have led to a different result").

This Court's decision in *Reeves* is entirely consistent with the Tenth Circuit's decision in *Randle*. Petitioner argues the mere existence of *Reeves* requires summary reversal, without any analysis of whether *Reeves* actually changed the law of the Tenth Circuit. It did not; it does not constitute intervening authority; and it certainly does not justify a summary vacation of the lower court's judgment.

II. THIS PETITION DOES NOT PRESENT ANY NOVEL OR IMPORTANT CONSTITUTIONAL ISSUES REQUIRING REVIEW BY THIS COURT

Petitioner presents *no* reasons why this Court should accept this ADEA case for review, nor any reason to set this case apart from any other age discrimination case. In fact, Petitioner's argument for review is simply a rehash of his already rejected arguments as to why the Tenth Circuit's decision was incorrect. He cites no legal authority whatsoever to support his arguments. He has cited neither contrary legal authority in the Tenth Circuit or a split in other Circuits that would purportedly justify this Court allocating time on its limited docket to consider this routine age discrimination case. Mere disagreement with a lower court decision is not grounds for Supreme Court review.

A. The Tenth Circuit's Decision Was Correct that Petitioner Failed to Overcome Respondent's Valid and Non-Discriminatory Reasons for Terminating His Employment

The Tenth Circuit applied the proper legal standards. It correctly noted that a party is entitled to judgment as a matter of law only if the "evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motions," citing *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1268 (10th Cir. 2000) (citing *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1241 (10th Cir. 1999)). It also stated that in reviewing the record, it would not weigh evidence, judge witness credibility, or challenge the factual conclusions of the jury. *Id.* Finally, it said judgment as a matter of law was appropriate only if there was no legally sufficient evidentiary basis for a claim

under the controlling law, and it would consider the evidence and any inferences drawn therefrom, in favor of the nonmoving party. That is precisely what the Tenth Circuit did in this case.

The Court also correctly analyzed that after a full trial on the merits, the sequential analytical model adopted from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804 (1973) is no longer operative, and the Court is "left with the overarching issue whether plaintiff produced sufficient evidence to warrant a jury's determination that adverse employment action was taken against him on the basis of age." *Doan v. Seagate Tech., Inc.*, 82 F.3d 974, 977 (10th Cir. 1966). A plaintiff bringing a claim under the ADEA must establish that his age was a "determining factor" in the employer's decision. *Greene v. Safeway Stores, Inc.*, 98 F.3d 554, 557 (10th Cir. 1996) (citing *Lucas v. Dover Corp.*, 857 F.2d 1397, 1400 (10th Cir. 1988)). Plaintiff need not prove that age was the sole reason for the employer's acts, but must show that age made the difference in the employer's decision. *Id.* (Judgment N.O.V. in ADEA case affirmed).

After applying the correct and applicable legal standard to review evidence of alleged pretext, the Court unambiguously found McGraw-Hill's reasons for terminating Petitioner were his demonstrably and objectively poor performance and failure to meet his quarterly sales goals for more than a year. It noted that Petitioner did not dispute the accuracy of the performance reviews when they were given. In accordance with *Randle* and *Reeves*, the Court concluded that Mc-Graw-Hill's stated reasons were true and correct, and that it believed these reasons for terminating Plaintiff's employment. Following that analysis, it held that

Petitioner failed to show that age was a determining factor in the decision to fire him or that McGraw-Hill's stated reasons for terminating his employment were pretextual. Having found that Respondent's reasons were worthy of credence, it was not necessary to consider the issue reached in *Reeves,* whether Petitioner was required to introduce additional evidence of pretext. This decision was correct and fully supported by law in the Tenth Circuit and in other circuits.

For example, in the recent and similar case of *Hardy v. S.F. Phosphates, Ltd. Co.,* 185 F.3d 1076 (10th Cir. 1999), the Tenth Circuit affirmed summary judgment in the defendant's favor in a suit under the ADEA and Americans with Disabilities Act (ADA). The Court held plaintiff's contentions that alleged contradictory explanations for termination of employment, an alleged slipshod investigation regarding termination of his employment, and alleged failure to discipline other younger employees accused of the same conduct were insufficient to avoid judgment as a matter of law. The Tenth Circuit rejected Petitioner's evidence, while construing it most favorably to him. The Plaintiff's evidence in *Hardy* was stronger than the evidence in this case. The Tenth Circuit recently cited both *Hardy* and *Reeves* in dismissing an ADEA and Title VII case as a matter of law in *Munoz v. St. Mary-Corwin Hospital,* 221 F.3d 1160, 1167 (10th Cir. 2000).

Petitioner's arguments regarding his past performance also carry no weight. The Tenth Circuit correctly held that the relevant inquiry is whether the Defendant perceived Plaintiff's performance as unsatisfactory, or simply used that rationale as a pretext for illegal discrimination because of Plaintiff's age. In a pretext case, it is the employer's

perception of the employee's performance that is relevant, not Plaintiff's subjective evaluation of his own relative performance. *Furr v. Seagate Tech., Inc.*, 82 F.3d 980, 988 (10th Cir. 1996). The Tenth Circuit has held that expectations of the employee's supervisors at the time of termination are relevant and that an employee cannot rely on past evaluations. To hold otherwise would mean that nothing could ever change. *See Ezold v. Wolf, Block, Schorr and Solis-Cohen,* 983 F.2d 509 (3d Cir. 1992).

The Court also correctly held that certain alleged statements by James Seike, a co-employee, were considered "stray comments" and not sufficient evidence of discrimination. To the extent they could be considered evidence of discrimination at all, they were not made by a decisionmaker, and not tied to the decision to terminate Petitioner's employment. The Tenth Circuit correctly held that age-related comments by supervisors might support an inference of age discrimination, but isolated or ambiguous comments may be too abstract to support such an inference. *Stone v. Outoliv Asp., Inc.*, 210 F.3d 1132, 1140 (10th Cir. 2000). It also held that Plaintiff must demonstrate a nexus between the alleged discriminatory statement and the company's termination decision and that age actually played a role in Defendant's decision making process and had a determinative influence on the outcome. *See Cone v. Longmont United Hosp., Assn.*, 14 F.3d 526, 531 (10th Cir. 1994) and *Rea v. Martin Marietta Corp.*, 29 F.3d 1450, 1455 (10th Cir. 1994).

The Tenth Circuit has held that the ADEA is not a Civil Service statute. *Faulkner v. Super-Valu Stores, Inc.*, 3 F.3d 1419 (10th Cir. 1993). The recent Fourth Circuit decision in *Dockins v. Benchmark Communications, Inc.*, 176 F.3d 745

(4th Cir. 1999) is also very similar to this case. Plaintiff in *Dockins* was also a salesman terminated for poor performance. The Court concluded his previous performance evaluations said nothing about his overall performance deficiencies during the relevant time period; his self-serving assertions of discrimination were insufficient to counter substantial evidence of legitimate nondiscriminatory reasons for discharge; and a statement by a co-employee that plaintiff was a "dinosaur" was insufficient to connect the comment to any decision regarding his employment. The court concluded:

> At base, it is clear that Benchmark's decision rested wholly on the necessities of the business world. It is not that we are without empathy for Dockins' situation. We understand the fact that bottom line business realities produce decisions that are difficult for the individuals affected by them. But the lifeblood of any business is its ability to sell its product. If salesmen underperform, a business cannot survive. And if a business does not survive, all of its employees, including its senior ones, will be out of work. That is why the ADA does not "require an employer to adopt a life of economic altruism and thereby immunize protective class members from discharge or demotion despite their poor performance."

176 F.3d at 749, citing *Gairola v. Virginia Dep't. of Gen. Servs.*, 753 F.2d 1281, 1287 (4th Cir. 1985). That analysis applies directly to this case. The Court of Appeals correctly concluded that McGraw-Hill legally terminated Petitioner's employment after it endured more than a year of

demonstrably and objectively poor performance without improvement. It did not second guess that decision and did not impose a higher burden of proof on Petitioner to prove pretext. Its decision must be upheld.

This case does not conflict with law in other Circuits. To the contrary, several other decisions in other Circuits support judgment as a matter of law in age discrimination cases. These include *Diettrich v. Northwest Airlines,* 168 F.3d 961 (7th Cir. 1999); *Keller v. Orix Credit Alliance, Inc.* 130 F.3d 1101 (3d Cir. 1997); and *Norton v. Sam's Club,* 145 F.3d 114 (2d Cir. 1998). As in this case, the employees failed to show that age, as opposed to other reasons, was the determinative factor in the employer's decision.

Moreover, several decisions decided after *Reeves* have upheld judgments as a matter of law or summary judgments in favor of employers in ADEA and other civil rights cases. The very same panel that decided this case cited *Reeves* and upheld judgment as a matter of law in a Title VII case in *Stewart v. Adolph Coors Co.,* 217 F.3d 1285 (10th Cir. 2000). *See also, Munoz v. Mary-Corwin Hospital,* 221 F.3d 1160 (10th Cir. 2000), previously cited in this Brief.

For representative cases in other circuits, *see Schnabel v. Abramson,* 232 F.3d 83, 90-91 (2d Cir. 2000) (quoting *Reeves* and finding plaintiff's evidence of alleged age discrimination to be insufficient as a matter of law); *James v. New York Racing Association,* __ F.3d __ (2d Cir. 2000), (while plaintiff satisfied the minimal *McDonnell Douglas* standard for a *prima facie* case and offered evidence that arguably would allow a reasonable fact finder to conclude defendant's explanation for his termination was false, plaintiff's evidence was insufficient to permit a reasonable

trier of fact to find that age discrimination was the reason for his discharge); *Vadie v. Mississippi State University,* 218 F.3d 365 (5th Cir. 2000) (judgment as a matter of law entered in a Title VII case; *Reeves* followed the Court's earlier *en banc* decision in *Rhodes v. Guiberson Oil Tools,* 75 F.3d 989 (5th Cir. 1996)). *Id.* at 373 n.23. As in those cases, the decision in *Reeves* did not change the analysis nor the results in this case.

CONCLUSION

The Court of Appeals decided this case *after* the *Reeves* decision, and was well aware of it. The Court of Appeals decision was entirely consistent with existing Tenth Circuit law, which was in accordance with the *Reeves* decision. The entire Tenth Circuit expressly considered this Court's decision in *Reeves*, as specifically requested by Petitioner in his Petition for Rehearing, and correctly concluded that it did not require reversal of the Panel decision. Summary vacation of the lower court's order is unnecessary, as *all* members of the Court of Appeals have considered and unanimously rejected precisely the same arguments raised by Petitioner to this Court. *Reeves* is not intervening authority, as it did not change the law of the Tenth Circuit. Therefore a summary vacation of the Order and remand is unnecessary.

On the merits of the appeal, Petitioner presents no reasons for the Court to accept this Petition other than his continuing disagreement with the Court's decision. This Court considered the issues raised in this Petition last term, and Petitioner has presented no reasons for the Court to revisit these issues. Contrary to Petitioner's arguments, the Tenth Circuit properly applied the law and facts to conclude

that Petitioner presented insufficient evidence as a matter of law to justify the District Court judgment in his favor. This Petition must therefore be denied.

Respectfully submitted,

KAREN E. FORD
Counsel of Record
FRANKLIN A. NACHMAN
LITTLER MENDELSON
A PROFESSIONAL CORPORATION
Attorneys for Respondent
1200 17th Street, Suite 2850
Denver, CO 80202-5835
(303) 629-6200